U.S. Department of Labor
Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 98-1128

THEODORE FAULK
Claimant-Respondent

v.

NORFOLK SHIPBUILDING AND
DRYDOCK CORPORATION
Self-Insured
Employer-Petitioner

NEWPORT NEWS SHIPBUILDING
AND DRY DOCK COMPANY
Self-Insured
Employer-Respondent

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT
OF LABOR
Respondent

DECISION and ORDER

DATE ISSUED: May 17, 1999

Appeal of the Decision and Order of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

Gary R. West (Patten, Wornom & Watkins, L.C.), Newport News, Virginia, for claimant.

Gerard E.W. Voyer and Donna White Kearney (Taylor & Walker, P.C.), Norfolk, Virginia. for Norfolk Shipbuilding and Drydock Corporation.

Benjamin M. Mason (Mason & Mason, P.C.), Newport News, Virginia, for Newport News Shipbuilding and Dry Dock Company.

LuAnn B. Kressley (Henry L. Solano, Solicitor of Labor; Carol DeDeo, Associate Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

Norfolk Shipbuilding and Drydock Corporation (Norfolk) appeals the Decision and Order (97-LHC-1216, 97-LHC-1496) of Administrative Law Judge Daniel A. Sarno, Jr., rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with law. *O'Keeffee v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant worked for Newport News Shipbuilding and Dry Dock Company (Newport News) from 1973 until 1978, and he was exposed to asbestos Owing this employment. Claimant then worked for Norfolk from 1978 until 1996 as a shipfitter. On November 27, 1996, Dr. Wilson diagnosed claimant with peritoneal mesothelioma, and the parties stipulated that the condition was caused, at least in part, by asbestos exposure. The parties further stipulated that claimant is permanently totally disabled due to the mesothelioma. Claimant filed claims for compensation against both employers. By order dated April 30, 1997, the administrative law judge, agreeing that the cases against both employers involved the same operative facts and issues, entered an Order of Consolidation and Expedited Hearing.

In his Decision and Order, the administrative law judge found that because claimant's last period of injurious exposure to asbestos occurred during the course of his employment with Norfolk in 1996, Norfolk is the responsible employer under the Act, The administrative law judge awarded claimant permanent total disability benefits of $426.72 per week from November *29,* 1996, to the present and continuing, and medical benefits under Section 7 of the Act, 33 U.S.C. §907. The administrative law judge also awarded claimant interest. The administrative *law* judge further found that Norfolk is entitled to a credit for alt third-party settlements entered into by claimant to date. Finally, the administrative law judge found that Norfolk failed to establish that claimant had a pre-existing permanent partial disability that contributed to claimant's total disability as required by Section 8(1) of the *Act,* 33 U.S.C. §908(0; therefore he denied Norfolk relief from the Special Fund.

On appeal, Norfolk challenges the administrative law judge's finding that it is the responsible employer and that it is not entitled to Section 8(1) relief. Newport News responds, urging affirmance of the administrative law judge's finding that Norfolk is the responsible employer based on application of the last employer rule. The Director, Office of Workers' Compensation Programs (Director), has responded, confining its brief to the Section 8(f) issue. Claimant also has filed a response brief, urging that the administrative law judge's responsible employer finding be affirmed.

After consideration of the evidence, we affirm the administrative law judge's responsible employer determination, because his finding that claimant was last exposed to injurious stimuli while employed with Norfolk and that it is thus the responsible employer wider the Act is supported by substantial evidence and in accordance with law. *See O'Keefe,* 380 U.S. at 339. The standard for determining the responsible employer or carrier was enunciated in *Travelers Insurance Co. v. Cardillo*, 225 F.2d 137 (2d Cir.), *cert. denied,* 350 U.S. 913 (1955). Pursuant to *Cardillo,* the last employer or carrier to expose the employee to injurious stimuli prior to his awareness of his occupational disease is liable for any compensation owed under the Act. *Accord Todd Shipyards Corp. v. Black,* 717 F.2d 1280, 16 BRBS 13 (CRT) (9th Cir. 1983), *cert. denied*, 466 U.S. 937 (1984); *see also Argonaut Insurance Co. v. Patterson*, 846 F.2d 715, 21 BRBS 51 (CRT) (11th Cir 1988). A distinct aggravation of an injury need not occur for an employer to be held liable as the responsible employer; exposure to potentially injurious stimuli is all that is required under the *Cardillo* standard. *See Lustig v. Todd Shipyards Corp.*, 20 BRBS 207 (1988), *aff'd in pert. part and rev'd in part sub nom. Lustig v. U.S. Depart. Of Labor*, 881 F.2d 593, 22 BRBS 159 (CRT)(9th Cir. 1989).

In the present case, the administrative law judge concluded that claimant was last exposed to injurious stimuli while working for Norfolk. In so finding, the administrative law judge found claimant to be a very credible witness, noting that

claimant was candid about his lack of expertise in identifying asbestos and only alleged exposure to asbestos when he was certain of it. Claimant testified that, while he believed he may have worked on many ships exposing him to asbestos at Norfolk,[12] he could recall only one incident of confirmed exposure to asbestos, which occurred aboard the USS FLINT, when pipe insulation ruptured in a particular compartment where he worked; claimant testified he entered this area twice following the rupture to pick up and return tools. Tr. At 64; NNS Ex. 1 at 35-40. Claimant stated that he wore a respirator on the day he learned of the presence of asbestos, but had not been wearing a respirator at the time the rupture occurred. Tr, at 68. The administrative law judge further reasoned that the credible testimony of Mr. Barrington, an industrial hygienist at Newport News) generally buttresses claimant's testimony that he may have been exposed to asbestos at other times while performing repair work at Norfolk on various Navy ships. According to Mr. 1larrington, based on the Naval Ship's Technical Manual, §633-10.8 (1st rev. May 15, 1986), ships built prior to 1971 used asbestos for thermal insulation. Tr, at 93,96-97; NNS Ex. 4..Mr. Harrington confirmed that two of the

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[12] Claimant recalled working on other U.S. Navy ships which may have exposed him to asbestos. Claimant's work involved chipping and tearing out tile flooring, which he later learned could have contained asbestos. He also worked around other employees tearing out insulation and later learned it may have contained asbestos.

ships on which claimant worked at Norfolk were built before 1971.

The evaluation of this evidence was within the administrative law judge's authority. As the fact finder, the administrative law judge was entitled to conclude that claimant was a credible witness. *See Jones Stevedoring Co. v. Director, OWCP ITaylor)* ', 133 K3d 683, 31 BRBS 178 (CRT) (9th Cit. 1997). *See also Avondale Industries, Inc. v. Director, OWCP,* 977 F.2d 186, 26 BRBS 115 (CRT) (9th Cir. 1992). As the administrative law judge rationally credited claimant's testimony and found it supported by other credible evidence, his conclusion that claimant was exposed to asbestos during his employment at Norfolk is supportcd by substantial evidence.

We reject Norfolk's assertion *that Port Portland v. Director, OWCP,* 932 F.2d 836, 24 BRBS 137 (CRT) (9th Cir. 1991), and *Todd Pacific Shipyard v. Corp. v. Director, OWCP [Picinich),* 914 F.2d 1317, 24 BRBS 36 (CRT) (9th Cir. 1990), require a showing that claimant's exposure to asbestos actually contributed to or aggravated his occupational disease. The court in *Port of Portland* specifically rejected this contention, stating, "[w]e agree with the Board that *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 I3RBS 744 (9th Cri. 1978), *cert. denied,* 440 U.S. 911(1979), does not require a demonstrated medical causal relationship between claimant's exposure and his occupational disease." *Port of Portland* 932 E.2d at 840,24

BRBS at 143 (CRT). The United States Court of Appeals for the Fifth Circuit has held as well that regardless of the brevity of the exposure, if it has the potential to cause disease, it is considered injurious. *Fulks v. Avondale Shipyards, Inc.*, 637 F.2d 1008, 1012, 12 BRBS 973, 978(5th Cir.), *cert, denied,* 454 U.S. 1080 (1981), *cited in Avondale Industries,* 977 F.2d at 190, 26 BRBS at 113 (CRT); *see also Lustig,* 881 P.24 at 593, 22 BRBS at 139 (CRT).

In *Susoeff v. The San Francisco Stevedoring Co.,* 19 BRBS 149 (1986), the Board addressed employer's burden of proof regarding causation and the determination of the responsible employer. The Board held that once an employee has established that he was exposed to injurious stimuli while engaged in covered employment, that employer could escape liability by showing that the employee's injury is not work-related or by establishing that he was exposed to injurious stimuli while performing work covered under the Act for a subsequent employer. *Id.* at 151. *Accord Avondale Industries,* 977 F.2d at 186, 26 BRBS at 113 (CRT); *General Ship Service v. Director, OWCP,* 938 F.2d 960, 25 BRJ3S 22 (CRT) (9th Cir. 1991). *See also Lins* v. *Ingalls Shipbuilding, Inc.,* 26 BRBS 62 (1992). Norfolk has not provided any evidence that claimant's injury is not work..related or that claimant was engaged in subsequent covered employment. Moreover, *Picinich* does not aid Norfolk, as in that case the employer produced evidence that exposure was below levels considered injurious. Norfolk has not

produced such evidence her; and it bears the burden of proving it as not the responsible employer. Accordingly, we affirm the administrative law judge's finding that Norfolk is the responsible employer.

Norfolk next challenges the administrative law judge's denial of Section 8(f) relief. The administrative law judge denied Norfolk's request for relief pursuant to Section S(f), finding that it failed to establish the contribution and pre-existing permanent partial disability elements necessary for such relief to be granted. The Director has responded, seeking affirmance of the administrative law judge's denial of Section 8(1) relief.

Section 8(t) shifts liability topsy compensation for permanent disability or death after 104 weeks from an employer to the Special Fund established in Section 44 of the Act. 33 U.S.C. § §908(0, 944. An employer may be panted Special Fund relief, in a case where a claimant is permanently totally disabled, if it establishes that the claimant had a manifest preexisting permanent partial disability, and that his current permanent total disability is not due solely to the subsequent work injury. *See* 33 U.S.C. §908(f)Q); *Director, OWCP* v. *Luccitelli,* 964 F2d. 1303, 26 BRBS I (CRT) (2d Cir.1992); *Two "R" Drilling Co. v. Director, OWCP*, 894 F.2d 748, 23 BRBS 34 (CRT) (5th Cir. 1990); *John T. Clark & Son of Maryland v. BRB.*, 622 F.2d 93, 12 BRBS 229(4th Cir. 1980). Thus, where an employee is permanently totally disabled, an employer must demonstrate that

the total disability is caused by both the work injury and the pre-existing condition in order to receive Section 8(f) relief. *See Director, OWCP v. Jaffee New York Decorating*, 25 F.3d 1080, 28 BRBS 30 (CRT) (D.C. Cir. 1994); *Dominey* v. *Arco Oil & Gas Co.*, 30 BRBS 134 (1996).

In order to establish a pre-existing permanent partial disability "[there must exist, as a result of [an] injury, some serious, lasting physical problem." *Director, OWCP v. Belcher Erectors* 770 F.2d 1220, 1222, 17 BRBS 146, 149 (CRT)(D.C. Cir. 1985); *C & p Telephone co. v. Director, OWCP*, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977). The only evidence of record to support employer's allegation *is* a September30, 1996 chest x-ray, read by Dr. Can, showing "[s]ome linear atelectasis or scarring." NSC Ex. 8(c). Although the administrative law judge gave the opinion of Dr. Schwartz that x-ray evidence of lung scarring did not contribute in any way to claimant's level of impairment compelling weight, this opinion is relevant to the contribution element of Section 8(0. rather than to the existence of a pre-existing disability. The administrative law judge, however, also found that Dr. Reid, the Newport News clinic physician, whose opinion Norfolk maintains establishes a pre-existing serious condition, failed to reconcile Dr. Can's opinion that the noted scarring represented "no acute cardiopulmonary abnormality," NSC Ex. 8(c), with his statement that the x-ray demonstrated a permanent and serious pre-existing condition. NSC Ex. 8(d). The administrative law judge also noted that

there was no evidence that Dr. Reid was Board-eligible in pulmonary medicine. The administrative law judge thus essentially discredited Dr. Reid's opinion based on his lack of expertise and because the administrative law judge did not find it well-reasoned, Accordingly, we affirm the administrative law judge's finding that Norfolk failed to establish that claimant had a pre-existing permanent partial disability.

Norfolk next argues that the administrative law judge erred in applying the *Luccitelli* rule to find that mesothelioma alone caused claimant's permanent total disability, as mesothelioma is a fatal disease which always results in disability and death, thus undermining the Congressional intent of Section 8(1). We reject Norfolk's assertion, as the statute requires that the ultimate disability not be solely due to the last injury, and we affirm the administrative law judge's determination that Norfolk has failed to show that claimant's mesothelioma alone would not have caused permanent total disability. "Where a subsequent injury and its effects are alone sufficient to cause permanent total disability the mere presence of' a pre-existing disability will not warrant contribution from the special fund," *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Carmines]*, 138 F.3d 134, 143, 32 BRBS 48, 55 (CRT) (4th Cir, 1998), *citing John T Clark & Son of Maryland, Inc.* v. *BRB,* 621 F.2d 93, 95 & n.2 (4th Cir. 1980). Contrary to Norfolk's contention, it was within the administrative law judge's discretion to give the opinion of Dr. Reid that claimant's

lung scarring materially and substantially contributed to his condition little, if any, weight both because Dr. Reid is not pulmonary specialist and as he appears to characterize claimant's mesothelioma us being in his lungs rather than his abdomen, whereas virtually all other physicians found abdominal mesothelioma with no pleural involvement.[13] Thus, as the administrative law judge's determination that employer failed to establish the contribution element necessary for Section 8(f) relief is supported by the record, we affirm that finding and consequently his denial of Section 8(f) relief in this case.[14] *See*

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[13] Dr Reid's opinion is, in any case, relevant to the standard for establishing entitlement to Section 8(F) relief in the case of permanent partial, rather than permanent total, disability. *See Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Carmines],* 138 F.3d 134,32 BRBS 48 (CRT) (4th Cir. 1998). Moreover, as Director notes, contrary to Norfolk's assertion, in *Director, OWCF v. Newport News Shipbuilding & Dry Dock Co. [Harcum 11],* 131 F.3d 1079,31 BRBS 164 (CRT)(4th Cir. 1997), the Fourth Circuit did not preclude the application of the "but for" test; rather it concluded that it was not applicable in cases of permanent partial disability.

[14] Norfolk's contention that the administrative law judge erred in applying the "but for" test in this ease is not dispositive. Norfolk is referring to the test devised by some circuits which requires that an employer prove entitlement to Section 8(f) relief by showing that "but for" the pre&existing disability, the claimant would be employable. *See Director, OWC.P v. Jaffe*

generally Cordero, 580 F.2d at 1331, 8 BRBS at 744.

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH

New York Decorating, 25 F.3d 1080, 28 BRBS 30 (CRT)(D.C. Cir. 1994); *CNA Ins. Co. v. Legrow,* 935 F.2d 430, 202 (CRT) (1st CiR. 1991). As employer states, the Courts of Appeals have phrased employers burden of proof using either "not due solely" terminology or "but for" terminology. In *Dominey,* the Board held that the "but for" test is merely a variation of the standard used by Courts of Appeals having the same implications; a claimant's total disability must have been caused by both the work injury and pre-existing condition. 30 BRBS at 137. In this case, the administrative law judge, after weighing the medical evidence of record, reasonably relied on the medical opinions that claimant was permanently totally disabled due to his asbestos-related mesothelioma alone. His finding that claimant's mesothelioma is alone permanently totally disabling is supported by substantial evidence, and therefore under either test, employer has not proven entitlement to Section 8(f) relief.

Administrative Appeals Judge

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JAMES F. BROWN
Administrative Appeals Judge

CERTIFICATE OF SERVICE

98-1128 Theodore R. Faulk v. Newport News Shipbuilding and Drydock Company, Norfolk Shipbuilding and Drydock Corporation (Case No. 97-LHCA-1216) (OWCP No. 05-0100463), 05-0100464)

I certify that the parties below were served this day.

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